In The
United States Circuit Court of Appeals for the Ninth Circuit.

J. A. CRESSEY,
Plaintiff in Error,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, a corporation,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

This cause comes here on Writ of Error to review the action of the District Court for the District of Oregon in entering judgment on the

pleadings against the plaintiff in error.

The suit is brought against the International Harvester Company of America to recover $2,-082.96 due plaintiff as bonus or commission over and above a fixed salary of $125 per month.

Aside from directing the court's attention to the averments of plaintiff's pleading, no further statement of the case would be of any assistance. His causes of action are found in his "Second Amended Complaint."

"The "Second Amended Complaint," in substance, contains the following allegations:

That the defendant is a corporation engaged in the manufacture, sale and distribution of farm and agricultural implements and machinery throughout the United States; that its business is done through general agents to whom certain territory is assigned, and that they, in turn appoint sales and collection agents who are assigned to certain districts in the general agent's territory; the various branches of its business, such as the appointment of local agents for the sale of its machinery, the setting up and demonstration of its various machines, the sales, and the collection of its commercial paper, was done through specialists or experts in the various lines of work; that plaintiff was an expert or specialist on collections and had been in the company's employ in that capacity for several years prior to the date of the contract in controversy in this suit; that

it had been the custom of the company for many years to make annual contracts with its collection agents during the month of July, and to also offer to each collection agent a commission or bonus over and above the amount stated in the written contract, on condition that he reached a standard fixed by a written schedule, delivered with the contract, which bonus or commission was never due or payable until the end of the calendar year; and in the territory of South Dakota where plaintiff was employed, the maximum amount paid collectors was $100 per month and his actual traveling expenses; that plaintiff had been paid a larger amount per month than that, with the understanding and agreement that he should always report in his expenses, and salary at $100 per month, after the receipt of which, the balance of his salary would be remitted to him; that on or about July 1st, 1908, plaintiff was requested by J. C. Sheldon, the general agent of the company to again enter into the company's employ as a collector; at that time it was agreed by and through said general agent that he was to receive a monthly salary of $125 per month and his traveling expenses, and in addition thereto he was to receive a bonus or commission provided his total expenses during the year 1909, including his monthly salary of $125 per month, did not exceed a certain per cent of costs as specified and set out in the following schedule, to-wit:

"Applicable to the season of 1909 with the

exception that we have made the standard for Mr. Cressy and Mr. Williams for 1909 as follows:

For the first 8 months of the year, that is, from January 1st, to September 1st,
Per cent cost on cash collected_____ 7%
Per cent cost on cash and claims secured_ 5%

For the first 4 months of the year from September 1st, to January 1st,
Per cent cost on cash collected_____ 2%
Per cent cost on cash and claims secured_ 2%
Desperate claims average for the year__$2500

We have made the standard for Mr. Reed for 1909 as follows:

For the first 8 months of the year, that is, from January 1st to September 1st,
Per cent cost on cash collected_____10%
Per cent cost on cash and claims secured_ 7%

For the 4 months of the year from September 1st to January 1st,
Per cent cost on cash collected_____ 4%
Per cent cost on cash and claims secured_ 4%

Desperate claims average for the year_$2500," and provided further that during the year 1909 he collect at least $2500 of desperate claims, and that he would remain in the company's employ from that time until January 1st, 1910; it is further alleged that said company, through its general agent, knew at that time that plaintiff's services were worth more than $3000 per year, and that he would not enter into a contract to work for $125 per month; that it was then and there specifically and in words agreed by plaintiff and said company through its general agent that if he did sign the company's customary "per-

sonal service agreement," the company would pay to him the said bonus or commission as aforesaid, which personal service agreement is as follows:

"Personal Service Agreement.

THIS AGREEMENT, entered into this 13th day of July, 1908, by and between the International Harvester Company of America (Incorporated), party of the first part, and J. A. Cressey of Watertown, State of S. D., party of the second part.

WITNESSETH, That the first party hereby hires the second party to serve and to perform such duties and at such places as it may from time to time direct; and the second party agrees to faithfully perform to the best of his ability all the duties and responsibilities of such service, and to devote his whole and undivided time to the party of the first part during the continuance of this contract, and not to engage, or to be engaged, nor to be interested in other business during the existence of this contract.

IN CONSIDERATION the first party will pay to the second party at the rate of One Hundred Twenty-five and no-100 Dollars ($125.00) per month and necessary traveling expenses actually incurred in the business while away from Aberdeen, S. D., his home or usual place of residence.

THIS contract to be in force from 15th day of August, 1908, until canceled, which may be done by either party hereto, without liability for damage, by giving written notice.

And it is further agreed that the second party is to furnish at his own expense to first party a bond for the sum of $2000.00 in some surety company, to be designated by the first party.

International Harvester Company of America,
By J. C. Sheldon,
J. A. Cressey.

Approved at Chicago, Ill.,
July 18th, 1908,
International Harvester
Company of America,
By J. N. Coburn."

and at the time said defendant, through its said general agent, requested that plaintiff, in making out his monthly statement, report his salary in at $100 per month and after its receipt the company would remit to him $25, the balance of said monthly salary which plaintiff agreed to; and his reports and remittances were made in accordance therewith; that relying upon the company's promise and agreement to pay the said bonus or commission, he signed the said writing and entered into the employ of said company and continued therein until January 1, 1910; that during all that time, he made written reports of the desperate claims collected and the amount due him according to said schedule and mailed the same to the company at the end of each month, and at the end of the period January 1, 1910, he mailed to the company a general itemized statement of the desperate claims collected, and of the commission or bonus due him in accordance with his contract, which amounted to $2,172.78, and upon the receipt of that statement the company remitted $89.82, claiming that that was all that was due him under his contract for bonus or commission; that plaintiff had no

knowledge or intimation that the company would, or that it intended to repudiate said agreement until after he received said remittance of $89.82 as aforesaid; it is further alleged in said complaint that had plaintiff known that said company would not carry out its agreement to pay him said bonus or commission, he would not have entered into the company's employ as it then and there well knew. That in accordance with the custom aforesaid, on or about July 1, following, the company's said general agent requested plaintiff to sign another annual personal service agreement; that the same was signed with the same promises and agreements and understanding as to the bonus or commission that the former agreement was signed; that plaintiff then and there stated to said company through its general agent that he would not sign the same if it in any manner affected his said agreement for said bonus or commission, that said company then and there promised and agreed with plaintiff that if he would sign the said annual personal service agreement it would not in any manner affect his prior contract and agreement.

After plaintiff had finished his contract in South Dakota, he removed to the state of Oregon and entered into a written contract November 15, 1910, with the company for personal service in that state, in that contract it was provided that it might be terminated upon either party giving the other thirty days' notice; after this suit was brought, and without any cause whatever, the

company arbitrarily on July 24, 1911, discharged the plaintiff; plaintiff's second cause of action is based upon the company's failure to perform that contract and in said second cause of action seeks to recover $125, one month's salary.

The foregoing is a very brief statement of the facts set out in plaintiff's complaint, practically all of which, on the defendant's motion was stricken out as immaterial and redundant on the ground and for the reason that the establishment of the parol agreement would be permitting parol evidence to vary the terms of a written contract.

SPECIFICATIONS OR ERRORS RELIED UPON.

Plaintiff in error contends that the lower court erred in the following particulars:

1. In sustaining the company's motion to strike from the complaint all the parts included in said motion.

2. The court erred in sustaining the company's demurrer to said Second Amended Complaint.

3. The court erred in not entering judgment in favor of the plaintiff in error.

POINTS AND AUTHORITIES.

THE PLEADINGS. In response to the company's motion, the original complaint was amended by setting out the name of the general agent. Hence, there is really but one Amended Complaint

in the case, it is designated "Second Amended Complaint." To it no answer was filed. The company moved to strike out practically all of it except the mere averments concerning the written agreement for personal service. (R., 37 to 43.) The court sustained that motion. (R., 43.) Its action thereon is the real error complained of in this court. Plaintiff maintains that he should be permitted to plead and prove the facts as therein alleged.

The lower Court justified its ruling on the theory that all the facts pleaded, and struck out, tended to contradict and vary the terms of a written agreement and hence were redundant and immaterial. To reach that conclusion, the Court, of course, assumed that all of the contract was fully agreed upon and integrated into the written agreement. That nothing was understood beyond the letter of that agreement, and that it fully and completely reflected the minds of the parties thereto.

THE CONTRACT. What was the contract between the parties? Was it deliberately reduced to writing by the parties? If so, is the "personal service agreement" that contract; or, was only a portion of the real agreement reduced to writing? Was that portion of the agreement providing for the commission, the consideration which induced plaintiff to sign the "personal service agreement?" Did the "personal service agreement" express the real consideration agreed on by the parties?

Plaintiff maintains that the foregoing mate-

rial questions are properly raised by the averments in his complaint; and that they cannot be answered from a mere inspection of the "personal service agreement."

"Even though there has been an integration, *i. e.*, a reduction of a transaction to a final and exclusive written memorial, yet, since several transactions may be consummated by the same parties at the same time of negotiation, and since the parties may integrate one of these transactions and not another or may integrate one part of a transaction and not another part, it is of course always open to show that the integration was partial only; and in such case the terms of the remainder, not covered by the written memorial, may be gleaned from anything said or done by the parties independently of the writing. Effect is given to the written memorial as exclusively representing the terms of the transaction, but only because the parties have so intended it, and therefore only so far the parties have intended it. Since all depends thus on the parties' intention as to the extent or scope of the integration, the application of the principle will depend almost entirely on the circumstances of each case, including the kind of transaction, the usual terms of such transactions, the scope of the writing, and the surrounding circumstances of the particular negotiation. No detailed rules can be formulated; and the working of the principle can best be understood by noticing its application in particular instances."

I Greenleaf on Evidence, 445 (16th Ed.).

As declared in *Liebke v. Methudy*, 14 Mo. App. 65:

"The courts have endeavored to adapt their rulings either way to the obvious demands of abstract justice in each particular case."

According to the foregoing rule, the lower

court erred in sustaining the company's motion to strike.

It is averred in the complaint that the company on receipt of plaintiff's itemized statement of the amount due him under the parol agreement, remitted to him a part of the amount due, claiming at the same time that the amount remitted was all that was due. That in conjunction with the plaintiff's conduct in fully performing the contract covering a period of sixteen months, during all of which period monthly reports, in accordance with the parol agreement, were forwarded to and received by the company, are strong circumstances going to establish the construction that was placed upon this agreement by the parties themselves.

"The constructions placed on the contract by the parties themselves ought to prevail."

Dist. of Columbia, etc., vs. Gallagher, 31 U. S. 526.

THE PERSONAL SERVICE AGREEMENT.

An examination of this writing, discloses the fact that it is not a complete contract embodying all the elements of the agreement.

1. The duties or services to be performed are not specified.

2. The places at which he is to perform the services are not specified.

3. It reads: "In consideration the first party will pay to the second party, etc." In consideration of what services and for what period?

4. When was this salary payable?

5. It states that first party will pay at the rate of $125 per month and necessary traveling expenses while *away from Aberdeen, South Dakota.* What compensation was he to receive—what expenses was he to be allowed while performing services for the company at *his home in Aberdeen?*

6. It provides that the contract may be cancelled without liability by giving written notice. Plaintiff pleaded that in consideration of his remaining in plaintiff's employ until January 1st, 1910, he was to receive the bonus or commission sued for. That promise on his part alone was a sufficient consideration for the parol agreement.

7. It further provides that second party is to furnish a bond. For what purpose, upon what terms or conditions, this agreement does not state. Was the bond to include the faithful performance of the entire agreement, or only a portion of it?

8. What expense does the writing refer to, and what would be deemed proper "actual expenses"?

Therefore, "in the light of the contract's subject matter, the circumstances in which, and the purpose for which it was executed, which evidence is always admissible in the construction of written contracts, in order to put the court in the position of the parties," it is quite evident that this written agreement is not and was not intended to be the embodiment of the entire contract; and that plain-

tiff's claim for the extra compensation in commissions is not inconsistent therewith.

The part reduced to writing had reference, exclusively, to the fixed monthly wage; did not include, and was not intended to include the extra compensation to be earned, provided plaintiff did the extraordinary work so as to reach the standard fixed by the written schedule then delivered to him.

THE FACTS PLEADED AND STRUCK OUT, DID NOT AND WERE NOT INTENDED TO CONTRADICT THE PERSONAL SERVICE AGREEMENT.

In the lower Court, the company's counsel contended that these tended to vary and contradict the writing in only two particulars:

(1) In changing the consideration named in the writing.

(2) In seeking extra compensation for services included in the writing.

The first refers to that part of the writing specifying $125 per month.

The second refers to that part which includes all of plaintiff's time.

In the final analysis, it must be conceded that both of these parts of the contract go to the consideration. To know what was intended by each, one must first ascertain the true consideration for the contract.

In virtue of the facts pleaded, the case comes within the rule that the real consideration of a contract may be shown by parol evidence.

"Thus in *Philpot v. Gruninger*, 81 U. S. 14 Wall, 570, 577, it is stated that 'nothing is consideration that is not regarded as such by both parties.' To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract. In *Kilpatrick v. Muirhead*, 16 Pa. 117, it was said that 'consideration, like every other part of a contract, must be the result of agreement; the parties must understand and be influenced to the particular action by something of value or convenience and inconvenience recognized by all of them as the moving cause. That which is a mere fortuitous result following accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration.' See also I Addison, Contracts, 15; *Ellis v. Clark*, 110 Mass. 389. Now, evidence of what took place at the meeting, if admissible for no other purpose, was competent as bearing upon the question whether the prepayment was mentioned or treated as an inducement or consideration for the release of the residue of the claim."

The Fire Insurance Association, Limited, v. John W. Wickham, Jr., 141 U. S. Supreme Court Reports, 564.

Plaintiff does not ask for a greater salary than $125 per month for the services covered by

the writing. He does not attempt to ask for $150 or $200 per month for those services. By the written personal service contract, the company fixed a limit of its liability to plaintiff for his services as an ordinary collector, and for the services agreed on, but not included in the writing.

After thus fixing its liability, the company promised plaintiff that if he could during the year 1909 (Record, 25) collect at least $2500 of desperate claims, and keep the total cost of his services, including the monthly salary of $125 and all other costs and expenses down to the rate set out in the written schedule, he was to get the difference between that rate and the rate of his actual expenses to the company. Neither he nor the company could know what plaintiff's reward for his extraordinary services would be until January 1st, 1910. That was perfectly consistent with the written portion of the agreement. The safety and profitableness of the agreement, to the company, was verified in advance by its past experience.

In re Hartman, 166 Fed. 776, it is held:

"Parol proof of facts leading up to the execution and delivery of a written contract, to show the considerations moving the parties thereto, is not a violation of the parol evidence rule."

Plaintiff does not deny that he was to devote his entire time to the company. His entire time was required in the fulfillment of the contract as agreed upon. Only a part of which agreement was included in the writing. "To devote his whole and

undivided time to the party of the first part during the continuance of this contract, and not to engage, or to be engaged, nor to be interested in other business during the existence of this contract," does not mean in consideration of $125 per month, the company could demand all of plaintiff's time, days, nights, Sundays and holidays. That phrase in the writing must be interpreted by the court in the light of all the circumstances, the work to be done by plaintiff, the company's business, etc. And in the light of all the circumstances, it is quite evident that the real and only intent of that phrase was to obligate plaintiff to be under obligations to one master, the company; that he should not disqualify himself by being in any way engaged, or interested in any other business. It was not intended to include *all his time*, but to *exclude* his engagements or connections with any other concern. And hence the parol portion of the agreement in question does not contradict, neither is it inconsistent with that phrase in the writing.

In construing this writing, it seems to plaintiff's counsel, the court must presume that, at the time the writing was signed, it was agreed and understood what services plaintiff was to render the company. But the writing is silent on the subject. And being silent, it is legal and proper to show by parol what the services were to be.

We have pleaded what services were to be rendered for the $125 per month, and what were to

be rendered for the commission or bonus.

The facts pleaded were pertinent and material on the theory that the writing included only a part of the agreement; or, that the part not included in the writing, was a collateral agreement constituting the real consideration for the execution of the writing. And on either theory plaintiff is entitled to recover.

In arriving at what services were to be rendered for the $125, the written schedule, delivered to plaintiff at the time, is a part of the one transaction and should be considered by the Court.

In *Thomson v. Beal*, 48 Fed. 614 (U. S. Circuit Court, Mass., Colt, J.), suit was brought to recover interest on a certificate of deposit on the verbal promise of the cashier to pay interest. In deciding the question the court observed:

"The general legal proposition advanced by the defendant in support of the demurrer, that parol evidence cannot be introduced to contradict or vary the terms of a written agreement, is well settled, and requires no citation of authority.

But the question here presented is whether the certificate of deposit, which does not in express terms mention any interest, is to be considered as alone representing the entire contract in writing, or whether such certificate should not be taken in connection with the written memorandum made at the time on the stub of the bank's book from which the certificate was taken. In taking both writings together as constituting one contract, we are not seeking to add or to vary the terms of a written contract by parol evidence, but we are simply seeking to discover what the contract actually was, as

exhibited in writing made at the time. I understand the rule to be that all contemporaneous writings relating to the same subject-matter, while the controversy exists between the original parties or their representatives, are admissible as evidence, and that extrinsic evidence is admissible to show ment of the parties. *Payson v. Lamson*, 134 Mass. 593; *Hunt v. Livermore*, 5 Pick. 395. The defendant argues that the writing on the stub was a mere private memorandum made by the cashier for his own convenience. There is no allegation in the bill to this effect. The bill alleges that, at the time the which paper expresses the real intention and agree-certificate was given, 'Said cashier made a memorandum thereof by making, or causing to be made, the figures 2½ per cent on the stub or margin of the book from which said certificate was taken." In a certain sense, the stub and the certificate cut from it may be said to constitute but one writing; at all events, in my opinion, both may be consulted in order to ascertain what was the real contract between the parties. Demurrer overruled."

WHERE ONLY ONE PART OF AN AGREEMENT HAS BEEN REDUCED TO WRITING, PAROL EVIDENCE MAY BE RECEIVED TO ESTABLISH THE PORTION NOT INCLUDED THEREIN.

"Where a written contract was made in pursuance of a prior verbal contract between the parties broader in its scope, and as a means of carrying out a portion only of such verbal contract, the rule that a verbal agreement is conclusively presumed to be merged in a subsequent written contract does not apply, and the verbal agreement may be shown in a suit to determine the respective rights of the parties."

National Wire Bound Box Co. et al. vs. Healy, 189 Fed. 49, 110 C. C. A. 613.

One of the latest cases in support of the rule contended for by the plaintiff here is *Harman vs. Harman*, 70 Fed. 894; 17 C. C. A. 479. In that case two nephews leased certain land from their uncle. The lease was in writing and contained almost every imaginable condition, and among others it provided that the lessor reserved the right to cancel and terminate the contract at the end of any season, provided he sold the premises; it further provided that the lease would be terminated upon the death of either party to the contract.

Notwithstanding this written lease and these positive provisions, the court permitted the nephews to plead and establish by parol testimony that there was a verbal contract and agreement in addition to the written lease under and by virtue of which they took possession of the land and occupied it. And that under the provisions and conditions of the oral contract, they were to remain in possession of the farm, cultivate, care for, pay the rent as provided in the written lease, until the death of their uncle, at which time the premises were to become theirs.

In the recent case of *Haas Bros. v. Hainburg-Bremen Fire Insurance Co.*, 181 Fed., 916, this court had occasion to note the many exceptions to the parol evidence rule. And therein adopted the following rule:

"Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or under-

standing of the parties, the parol evidence rule does not apply to prevent the introduction of extrinsic evidence with reference to the matters not provided for in the writing."

In that case, plaintiff was permitted to plead a parol agreement which was the real consideration for signing the written release.

"Nor does the rule apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing. Thus, where, upon an adjustment of accounts, the debtor conveyed certain real estate to the creditor at an assumed value, which was greater than the amount due, and took the creditor's promissory note for the balance; it being verbally agreed that the real estate should be sold, and the proceeds accounted for by the grantee, and that the deficiency, if any, below the estimated value, should be made good by the grantor; which agreement the grantor afterwards acknowledged in writing—it was held, in an action brought by the latter to recover the contents of the note, that the whole agreement was admissible in evidence on the part of the defendant; and that, upon the proof that the sale of the land produced less than the estimated value, the deficiency should be deducted from the amount due upon the note."

I Greenleaf, Sec. 284 (16th Ed.).

"Certainly the general rule which excludes evidence of parol negotiations and undertakings, when offered to contradict or substantially vary the legal import of a written agreement, is not to be questioned or disturbed. In this state it has been thought to be so well settled in reason, policy and authority, as not to be a proper subject of discussion. It has full application, however, within very narrow limits. In the first place it applies only in controversies between parties to the instru-

ment (*New Berlin v. Norwich*, 10 Johns. 229), and between them is subject to exceptions, upon allegations of fraud, mistake, surprise, or part performance of the verbal agreement. Nor does it deny the party in whose favor that agreement was made, the right of proving its existence by way of defense in an action upon the written instrument under circumstances which would make the use of it for any purpose inconsistent with that agreement, dishonest, or fraudulent. *Martin v. Pycrft*, 2 DeG., M. & G. 785, 795; *Jervis v. Berridge*, L. R., 8 Ch. App. 351."

Julliard v. Chaffee, 92 N. Y. 531.

"So, to show that at the time of entering into a contract of service in a particular employment, there was a further agreement to pay a sum of money as a premium, for teaching the party the trade, whereby an apprenticeship was intended; and that the whole was therefore void for want of a stamp, and so no settlement was gained."

I Greenleaf on Ev., Sec. 285 (16th Ed.).

IF A CONTEMPORANEOUS PAROL AGREEMENT WAS THE CONSIDERATION OR INDUCEMENT FOR ENTERING INTO A WRITTEN AGREEMENT, THE PAROL AGREEMENT MAY BE SHOWN.

In plaintiff's Complaint, it is averred that the verbal agreement to pay the commission or bonus was the real consideration for signing the writing and entering the company's employ. And as a legal consequence the writing does not preclude a recovery on the verbal agreement.

Keller v. Cohen, 217 Pa. 522.

The court's attention is called to the case of

DePue v. Mackintosh, 127 N. W. 532, decided by the Supreme Court of South Dakota in July, 1910. That case involved a written contract entered into by the parties therein, all agreeing to bore a "flowing well" on land specified. The contract appears to be a complete contract in every particular.

The action was brought to recover the contract price, Five Hundred Dollars. The defendant answering alleged that the well was not drilled and completed as alleged and agreed upon by reason of which it was of no value whatever.

Then the defendant offered to file an Amended Answer setting out a verbal agreement that was made at the time of the signing of the written contract and which was the inducement for plaintiff's signing the written contract. It is alleged that in the verbal contract, the party knew that the well was intended to supply water for an extensive stock farm and that he agreed to drill the well and obtain a sufficient flow of water to supply all stock that might be placed on the farm, and by reason of his agreeing to do that the other party signed the written contract.

In passing upon that feature of the case, the court states:

"It is contended by the respondent that under the provisions of section 1239 of the Civil Code which provides, 'The execution of a contract in writing, whether the law required it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument,' the

facts set out in the amended answer were inadmissible on the ground that they would vary or contradict the terms of a written contract. This provision of our code embodies the common-law rule upon the subject of written contracts, and while 'the execution of a contract in writing, whether the law requires it to be written or not supersedes all of the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument,' 'nevertheless, as contended by the appellant, there are exceptions to the rule. And one of the exceptions seems to be that agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and where he executed the written contract upon the faith of the parol contract or representations, such evidence is admissible.' *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Thomas v. Loose*, 114 Pa. 35, 6 Atl. 326; *Dicken v. Morgan*, 54 Iowa, 684, 7 N. W. 145; *Cullmans v. Lindsay*, 114 Pa. 166, 6 Atl. 332; *Barnett v. Pratt*, 37 Neb. 352, 55 N. W. 1050; *Ayer v. R. W. Bell Mfg. Co.*, 147 Mass. 46, 16 N. E. 754; *Davis v. Cochran*, 71 Iowa, 369, 32 N. W. 445; 9 Ency. Evid. 350; *Ferguson v. Rafferty*, 128 Pa. 337, 18 Atl. 484, 6 L. R. A. 33; *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823; *Walker v. France*, 112 Pa. 203, 5 Atl. 208. In *Walker v. France*, *supra*, the Supreme Court of Pennsylvania, in discussing this subject, says: 'That a written agreement may be modified, explained, reformed or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract made by one of the parties at the time of the execution of the writing, and which induced the other party to

put his name to it, must now be regarded as a principle of law so well settled as to preclude discussion.'

In *Chapin v. Dobson, supra,* the Court of Appeals of New York held: 'The rule prohibiting the reception of parol evidence to vary or modify a written instrument does not apply where the original contract was verbal and entire, and a part only was reduced to writing.' Such, in fact was the case at bar, as appears by the allegations of the amended answer. That portion of the plaintiff's agreement to drill a well that would provide a sufficient flow of water to supply plaintiff's stock, and which was the inducing cause of the contract, was omitted therefrom."

In the case of *American Building and Loan Association v. Ole Dahl, et al,* (Minn.) 56 N. W. 47, defendants, Fagan and Cleveland were sued as sureties of defendant Dahl on a certain building bond, in and by which they undertook, upon the *consideration recited,* that the defendant, Dahl, would pay and *discharge all claims* for labor and material furnished in the construction of certain buildings. In their answer, the sureties alleged that at the time of the execution of the bond, it was mutually agreed by all parties thereto that the claim sued on was to be paid by the plaintiff and that such promise on its part was part of the consideration that induced the sureties to sign the bond. The court sustained the defense on the ground that the verbal agreement went to the execution of the bond, and the consideration therefor.

IF THE COMPANY PROCURED THE WRITTEN AGREEMENT ON ITS PROMISE TO CARRY OUT THE PAROL AGREEMENT, IT WOULD BE THE AUTHORIZATION OF A FRAUD TO PERMIT IT TO NOW REPUDIATE THE LATTER AFTER BOTH CONTRACTS HAVE BEEN EXECUTED.

"Nor is it essential to the admission of parol evidence that a fraud was originally intended. It is enough that, though the parties acted in mutual good faith at the inception of the transaction, an attempt is made to wrest the instrument to a purpose not contemplated or use it in violation of the accompanying agreement. It is as much a fraud to obtain a paper for one purpose and use it for a different and unfair purpose as to practice falsehood or deceit in its procurement. The primary honesty of purpose but adds to the moral turpitude of the subsequent effort to escape from it; or when moral guilt can be imputed as perhaps in our case, a legal delinquency attaches upon an attempted abuse of the writing sufficient to subject it to the influence of the oral evidence."

Rearich v. Swinhart, 11 Penn. State, 233, 51 American Decisions, 544.

"It may be conceded that no fraud was practiced upon the appellant by the appellee when he received the note, and that at that time he honestly intended to keep his promise as to how it should be paid; but however honest and upright his intention may then have been, if, to procure an unfair advantage to himself, he now attempt to exact payment from the appellant in violation of his promise, without which the note would not have been given, he is guilty of a fraud against which the appellant may defend; and the latter is not defending on the ground that the plaintiff had agreed that he

would not use the note as a note, but that he is attempting to use it differently from the use which he promised he would make of it."

Gandy v. Weckerly, 220 Pa. 285, 69 Atl. 858.

"In such a case the independent oral agreement must have been upon some collateral matter, and must have operated as an inducement to the complaining party to enter into the agreement, whereas in the absence of it he would not have done so. To deny the admission of evidence in such a case, if relevant to the issues made by the pleadings, would be to allow one of the parties to induce another to enter into the engagement under false representations, and to aid him to enforce it against his adversary notwithstanding the fraud practiced upon him, by holding out to him the fraudulent inducement. We recognize this principle, and believe it to be in full accord not only with the spirit of the statute, but also with adjudged cases: *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620; *Specht v. Howard*, 16 Wall 564; *Forsythe v. Kimbell*, 91 U. S. 291; *Seitz v. Bremers' Refrigerating Machine Co.*, 141 U. S. 510, 12 Sup. Ct. Rep. 46; *Van Winkle v. Crowell*, 146 U. S. 42, 13 Sup. Ct. Rep. 18; *Cliver v. Heil*, 95 Wis, 364, 70 N. W. 346; *Flynn v. Bourneuf*, 143 Mass. 277, 58 Am. Rep. 135, 9 N. E. 650; *Eighmie v. Taylor*, 98 N. Y. 288; *Beall v. Fischer*, 95 Cal. 568, 30 Pac. 773; *Bardford Investment Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083."

Armington v. Stelle, 27 Mont. 13, 69 Pac. 115.

"It is as much a fraud to obtain a paper for one purpose and use it for a different and unfair purpose, as to obtain it by fraudulent statements."

Murray v. Dake, 46 Cal. 644.

In *Young v. Stamfler*, 27 Wash. 350, 67 Pac. 721, the defendant was induced to execute a warranty deed in lieu of a quitclaim deed, upon the representation of the husband of the grantee that such a deed would better enable them to dispose of the property and that the warranty clause would not be enforced.

In admitting testimony to establish the parol agreement the court observed:

"The evidence to support the affirmative defense of the defendants was not introduced to control or vary the covenant in deed, but to prevent the enforcement of the same, because it was obtained in such a manner that it would be a fraud upon the covenantors to allow the enforcement of the covenants."

And in the very recent case of *Naden v. Christopher*, 62 Wash. 413 (1911), the same rule was followed where a clause in a warranty deed gave the grantee the right to collect all rents due under a certain lease, it was decided that parol evidence was admissible, as between the original parties, to show that it was inserted on the express stipulation that it should not be treated as a warranty; not to vary the terms of the deed, but to prevent its fraudulent use.

THE PAROL AGREEMENT WAS COLLATERAL TO THE WRITTEN AGREEMENT.

From plaintiff's complaint, it is clear that plaintiff and the company had two main obecjts in view. First, the company desired plaintiff's services. Second, plaintiff was anxious to procure

as remunerative a compensation as possible. He was also willing to earn every dollar of it. They did not agree on a certain fixed compensation. And it was finally left dependent upon the contingency of his attaining certain results. The amount the company would be liable for in any event was agreed to at the rate of $125 per month. That part was reduced to writing and signed. According to the company's custom, it would not include the bonus or commission part in the salary contract, but as the real inducement for plaintiff's signing, it positively agreed to pay the bonus or commission, and after the contract was entirely executed did pay a small part of it. According to the arrangement, plaintiff earned during 1909 on the salary part of the agreement $1,500—on the bonus or commission $2,172.78. Hence, the naked figures stand for more than words, and show the written part of the agreement was a mere incident to the entire arrangement.

The commission part of the agreement was collateral. It depended upon his employment. In arriving at the amount of commission due, the fixed monthly rate and expenses had to be figured on, and at the end of the calendar year, deducted from the total amount allowed by the schedule. By the arrangement, the company knew in advance the maximum amount it would be liable to plaintiff for in any event. And by the arrangement, a great inducement was held out to plaintiff whereby the company would derive the greatest possible result

from his efforts at the lowest possible expense. And when the entire transaction is justly analized in the light of all the circumstances, it does appear that both the written and parol parts of the agreement are consistent, and each is based on an independent essential part of the entire arrangement.

In *Reimer v. Rice*, 88 Wis. 16, 59 N. W. 450, the defendant gave to plaintiff a written option to purchase certain real property upon terms fully stated therein. Thereafter plaintiff brought suit alleging that he had an oral agreement with the defendant by which he was authorized to find a purchaser for the property and to receive as his commission for such services, the excess of the price thus obtained over and above the price which was named in the written option, and recovered on the theory that the parol agreement was collateral to the written agreement.

The case just cited was followed by the Supreme Court of Iowa in *Wells v. Hocking Valley Coal Co.*, 114 N. W. 1076.

"The principle that oral evidence cannot be received to vary, alter, or contradict the terms of a written contract is so elementary and well settled that it scarcely requires statement. It is a salutary rule, and one we believe that has been consistently adhered to by this court. But the rule itself suggests its limitations. It is the evidence which tends to establish an inconsistent obligation from that which is expressed in the writing which is rejected. Where, therefore, it is shown that there was an original verbal contract, and a part of it only has been reduced to writing, the rule does not apply as to the part not reduced to writing.

So if the oral and written contracts are distinct and separate undertakings, though perhaps relating to the same property, the fact that one is in writing does not prevent the proof of the other by parol if it be not inconsistent with the writing.' Along the line of the authorities hereinbefore cited by us, the court proceeds to say further: 'If, therefore, we regard the written option as a valid contract which authorized the agent himself to become the purchaser, it is a separate collateral contract which may consistently exist at the same time as the oral contract for the sale of the property to others on commission, and hence does not supersede or vacate it."

In *Heines v. Willcox*, 96 Tenn. 148, the plaintiff occupied defendant's house under a written lease. She sued to recover damages for personal injuries sustained by falling through a defective porch. Under the terms of the lease she was to keep the premises in good condition. So she based her suit on a contemporaneous agreement on defendant's part to repair the house. The lower court refused to consider the parol testimony, in reversing the judgment, the Supreme Court decided:

"The question as to whether the entire contract was reduced to writing, or an independent collateral agreement was made, was a question of fact, and where there was any evidence to sustain the contention, it was a matter for the jury to determine, and not for the court: *Cobb v. Wallace*, 5 Cold. 540, 98 Am. Dec. 435; *Stewart v. Phoenix Ins. Co.*, 9 Lea. 104, 112. We think it was therefore, error in the trial judge to determine these questions and exclude all evidence in regard to them."

The real question to be first decided in this case, is: Was there a parol agreement to pay this bonus or commission? According to the averments of the complaint, plaintiff is entitled to have that issue submitted to the jury.

Therefore, we believe plaintiff is fully entitled to recover the amount sued for, and that the lower court erred in sustaining the company's motion to strike, from the complaint, the portions included therein. And again erred in sustaining the demurrer and entering judgment against plaintiff.

SECOND CAUSE OF ACTION.

The second cause of action is based upon the written contract entered into by plaintiff and defendant company for personal services to be rendered in the state of Oregon. (See Contract, Transcript of Record, 35-36.) In that contract the following provision appears: "Either party may terminate this agreement by giving thirty days' notice to the other party. The first party may terminate the agreement at any time for neglect of duty, refusal to follow instructions, or should it consider second party's work unprofitable or undesirable, in which event compensation shall cease the day and date the agreement is terminated."

At pages 30 and 31, Transcript of Record, plaintiff avers in his complaint that the relation between him and defendant company was identically the same on July 24, 1911, when he was discharged, that it was at all times from and after November 15, 1910, when the contract was made; that he received no notice whatever of defendant's

intention to terminate the contract; that he was arbitrarily, capriciously, and without cause, discharged from defendant's employ; plaintiff further alleges that he did not neglect his duty to defendant, he did not refuse to follow instructions, and that his work and services were profitable and desirable to defendant company, and that it had no reason or cause whatever for discharging him without giving the thirty days' notice as provided by the contract. He further alleges that it was impossible for him to procure any other employment for more than thirty days after his discharge, and he seeks to recover $125, being the salary due for the month succeeding his discharge.

Plaintiff's contention is that under the terms of this contract, he is entitled to recover one month's salary on account of his being discharged without receiving the thirty days' notice. The contract in words so provides: "Either party may terminate this agreement by giving thirty days' notice to the other party."

It is contended by the defendant company that by the terms of the sentence, in the contract, following the above quotation, it had the right to arbitrarily, and without assigning any cause whatever, discharge plaintiff. If this construction be true, then the provision in the contract, requiring thirty days' notice becomes a nullity. When a contract is susceptible of two constructions, one that nullifies, the other that gives effect, the latter is always adopted.

Both these provisions of the contract should be read and considered together, in the light of the circumstances in which the contract was made and in consideration of all the other provisions in the contract, and when so weighed, the two provisions do not appear so inconsistent. The first provision states when either party may terminate the contract. The second provision specifically, and in words sets out that the company may terminate the contract if the plaintiff neglects his duties, refuses to follow instructions or should the company consider his work unprofitable or undesirable. It did not lodge with the company the absolute right to arbitrarily, or capriciously be the sole judge and arbiter of the existence of these conditions. This question was fully discussed and analyzed in *Parlin, etc. v. City of Greenville*, 127 Fed. 55 (5th Circuit), and in that opinion we find the following which seems to be exactly applicable to the question at bar.

"In *Rawlins v. Honolulu Co.*, 9 Hawaiian, 262, the plaintiff agreed to work in a skillful and proper manner to the satisfaction of the defendant. Construing the contract, the court said that the defendant was bound to be satisfied if the work was done in a skillful and proper manner. The court observed that the fact that one is the sole judge does not authorize him to act whimsically or in bad faith."

Other authorities are also collated in that opinion, which sustain plaintiff's right to recover.

In the case of *Beissel v. Vermillion Farmers*

Elevator Co. (Minn), 113 N. W. 575, the contract had this provision:

". . . That should the said party of the second part fail, neglect, or refuse to keep and perform any and all of the covenants herein set forth, and fail and neglect or refuse to perform said services in a manner satisfactory to the said party of the first part, . . . then and in that event the said party of the first part may, at its option, declare this agreement null and void, and the said party of the first part shall be absolutely and forever discharged from any and all liability under the conditions of this agreement."

and the court approved the following instruction:

"Now, this contract provides that the plaintiff might be discharged if he did not perform the services that he was engaged to perform to the satisfaction of the company. Did he perform the services to the satisfaction of the company? If they were dissatisfied with the manner in which he performed his services, was there a reasonable cause for that dissatisfaction? If so, they had the right to discharge him. Under this contract they could not act arbitrarily. They were not permitted to do that, or whimsically. If they had reasonable ground, or there was a reasonable cause for their dissatisfaction and they were dissatisfied, then they had the right to discharge him. . . ."

Practically this same question was involved in *Smith v. Robson* (N. Y.), 42 N. E. 677. The contract in that case had the following provision:

"The said J. R. Smith (plaintiff) further agrees that if at any time Stuart Robson (defendant) shall feel satisfied that he is incompetent to perform the duties which he has contracted to perform in good faith, or is inattentive to business, careless in the rendering of characters, or guilty of any violation of the rules made by Stuart Rob-

son, then he may annul this contract by giving two weeks' notice to said J. R. Smith."

Answering defendant's contention that he had the absolute authority to discharge the plaintiff, the court stated:

"The claim that the defendant reserved an arbitrary power to discharge the plaintiff is inconsistent with the presence of any limiting words in the contract. Construing the contract as claimed in behalf of the defendant, it is a contract terminable at the will of the defendant, but binding on the plaintiff for the period designated. If this had been intended, the clause is almost wholly superfluous. In that view, it was quite unnecessary to introduce any words of condition, or any reference to the conduct of the plaintiff. It was, doubtless, intended to give the defendant a wide discretion. The grounds which might exist for reasonable dissatisfaction on the part of the defendant could not readily be formulated in advance, so as to cover all the contingencies. It was reasonable that the defendant should be in a position, if in good faith he felt that the plaintiff did not come up to the requirements of the situation, to discharge him. If the defendant had shown to the satisfaction of the jury, acting in good faith, he had discharged the plaintiff because he was dissatisfied, and that his action was not arbitrary and capricious he could not have been held liable. But the question whether the defendant acted in good faith was by the contract a material question, and the motion for nonsuit, based on a construction of the contract which eliminated this element, was properly overruled."

Therefore, plaintiff is entitled to recover on his Second Cause of Action, and by reason thereof, the lower court erred in sustaining the general demurrer to his Complaint. Hence it would seem

that both law and justice demand the reversal of this judgment, and that plaintiff be permitted to proceed with the trial.

Respectfully submitted,

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